

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Transocean Gateway Corporation :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Year 1970 - 1973 :

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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 1st day of May, 1981, he served the within notice of Decision by certified mail upon Transocean Gateway Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Transocean Gateway Corporation  
26 Broadway  
New York, New York 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
1st day of May, 1981.

*Ernie A. Hayland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Transocean Gateway Corporation :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Corporation Franchise Tax :  
under Article 9A of the Tax Law :  
for the Year 1970 - 1973 :

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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 1st day of May, 1981, he served the within notice of Decision by certified mail upon Joseph F. McDonald the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Joseph F. McDonald  
Lord, Day & Lord  
25 Broadway  
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
1st day of May, 1981.

*Carrie A. Highland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

May 1, 1981

Transocean Gateway Corporation  
26 Broadway  
New York, New York 10004

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Joseph F. McDonald  
Lord, Day & Lord  
25 Broadway  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
TRANSOCEAN GATEWAY CORPORATION  
for Redetermination of a Deficiency or  
for Refund of Franchise Tax on Business  
Corporations under Article 9-A of the  
Tax Law for the Years 1970 through 1973.

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DECISION

Petitioner, Transocean Gateway Corporation, 26 Broadway, New York, New York 10004, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the years 1970 through 1973 (File No. 11689).

A formal hearing was commenced before Frank A. Romano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 6, 1977 at 9:15 A.M. and continued to conclusion at the same location on February 16, 1978 at 1:30 P.M. Petitioner appeared by Lord, Day & Lord, Esqs. (Joseph F. McDonald, Esq., of counsel). The Audit Division appeared by Peter Crotty, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUES

I. Whether petitioner, Transocean Gateway Corporation, was formed for or principally engaged in the conduct of a transportation or transmission business, thereby being subject to tax imposed by sections 183 and 184 of Article 9 of the Tax Law, and exempt from tax imposed under section 209 of Article 9-A of the Tax Law.

II. Assuming arguendo that petitioner, Transocean Gateway Corporation, is not a transportation or transmission corporation taxable under sections 183 and 184 of the Tax Law, whether section 1083 of the Tax Law bars an assessment

against said petitioner for the year 1970 under Article 9-A of the Tax Law where the Notice of Estimated Deficiency for 1970 was issued more than three (3) years after said petitioner filed its report under Article 9 of the Tax Law.

III. Assuming arguendo that petitioner, Transocean Gateway Corporation, is not a transportation or transmission corporation taxable under sections 183 and 184 of the Tax Law, whether the Notice of Estimated Deficiency issued against said petitioner for the years 1970 through 1973, both inclusive, are erroneous and in excess of the actual tax liability due and owing under section 209 of the Tax Law.

IV. Whether the filing by petitioner, Transocean Gateway Corporation, of New York State Reports of Transportation and Transmission Corporations and Associations under Article 9 of the Tax Law for the years 1970 through 1973, both inclusive, pursuant to advice of legal counsel, was made upon reasonable cause and did not constitute willful neglect, thereby rendering additional charges or penalties against said petitioner improper and inappropriate within the meaning and intent of section 1085(a) of the Tax Law.

#### FINDINGS OF FACT

1. Petitioner, Transocean Gateway Corporation (hereinafter sometimes called "TOG"), filed a New York State Report of Transportation and Transmission Corporations and Associations under Article 9 of the Tax Law for each of the years in question, listing its address as 26 Broadway, New York, New York 10004. Said petitioner did not file New York State Corporation Franchise Tax Reports under Article 9-A for such years.

2. On May 15, 1975, the Corporation Tax Bureau issued four Notices of Estimated Deficiency against TOG, imposing additional tax on the ground that it was not taxable as a transportation or transmission corporation under sections 183 and 184 of Article 9 of the Tax Law but, rather, was subject to

tax as a general business corporation under Article 9-A of the Tax Law. The deficiency imposed against TOG was computed as follows: (i) for the period ended December 31, 1970, additional tax of \$44,344.00, plus interest of \$11,083.50, making a total of \$66,511.00 (sic)\*; (ii) for the period ended December 31, 1971, additional tax of \$9,165.00, plus interest of \$1,741.35 and an additional charge or penalty of \$2,291.25, making a total of \$13,197.60; (iii) for the period ended December 31, 1972, additional tax of \$16,109.49, plus interest of \$2,617.79 and an additional charge or penalty of \$4,027.37, making a total of \$22,754.65; and (iv) for the period ended December 31, 1973, additional tax of \$11,146.00, plus interest of \$975.28 and an additional charge or penalty of \$2,786.50, making a total of \$14,907.78.

3. TOG timely filed separate petitions for redetermination of the deficiency or for refund of corporation franchise and business taxes under Article 9-A of the Tax Law for each of the years in question on the grounds that (i) TOG, as a corporation formed for or principally engaged in the conduct of a transportation business during the years 1970 through 1973, properly filed reports in those years under sections 183 and 184 of Article 9 of the Tax Law and, accordingly, was exempt from the tax imposed under Article 9-A of the Tax Law; (ii) the Notice of Estimated Deficiency issued on May 15, 1975 was barred by the statutory period set forth in section 1083 of the Tax Law with respect to the report filed by TOG on September 13, 1971 tax year ended December 31, 1970; (iii) the deficiency contained on the Notices of Estimated Deficiency issued on May 15, 1975 were erroneous and in excess of the actual liability of TOG, even if it

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\* The Corporation Tax Bureau's Audit Worksheet (Bureau Exhibit E) contained an additional charge or penalty in the amount of \$11,083.50 but this charge was omitted from the Notice of Estimated Deficiency (Bureau Exhibit A) issued to petitioner. However, the Notice recited the total tax liability of \$66,511.00 as set forth on the Audit Worksheet; thus, the discrepancy between the total tax liability asserted on the Notice and the amounts of the additional tax and interest shown thereon.

were required to file New York State Corporation Franchise Tax Reports under Article 9-A of the Tax Law; (iv) the total tax liability asserted on the Notice of Estimated Deficiency for the period ended December 31, 1970 is not consistent with the constituent amounts reflected thereon as additional tax and interest and (v) the filing of reports under Article 9 of the Tax Law was upon the advice of legal counsel and with reasonable cause, thereby rendering the additional charges or penalties improper and inappropriate within the meaning and intent of section 1085(a) of the Tax Law.

4. TOG is a New York corporation organized on or about August 14, 1967. All of its shares of stock is owned by Transocean Gateway Corporation, a Delaware corporation, which, in turn, is a wholly-owned subsidiary of American Export Industries, Inc. (hereinafter called "AEI").

5. During the years in question, AEI was a Delaware corporation which owned forty to sixty subsidiary corporations, of which approximately thirty-five were actively engaged as carriers in the transportation of goods and commodities via land and water.

6. The major subsidiary of AEI was American Export Lines, Inc. (hereinafter called "Lines") which, for many years, had been engaged in a general interstate and foreign shipping business and which filed its New York State income tax returns as a transportation company under Article 9 of the Tax Law.

7. With the advent and growth of containerization as a means of shipping goods, TOG was organized in 1967 to take over certain functions of Lines, i.e., the operation of the terminals (piers and wharfs). During 1968 and 1969, the first two full years of its existence, TOG was minimally active, being primarily engaged in leasing arrangements involving containers.

8. In 1968 and 1969, TOG filed New York State Corporation Franchise Tax Reports under Article 9-A of the Tax Law, listing its principal business

activity on its 1969 report as "development and operation of port facilities". During the years in question, TOG filed New York State Reports under Article 9 of the Tax Law, listing its principal business activity on its 1970 and 1971 reports as "development and operation of port facilities" and, on its 1972 and 1973 reports, as "port transportation".

9. TOG's primary function at the terminal or pier was the loading and unloading of cargo onto and from vessels. In the course of that activity, TOG provided incidental services, such as security and, to a minimal degree, storage.

Through a bill of lading system, goods or cargo were transported to and from the terminal or pier by carrier, some of which were trucking companies, operating as wholly-owned subsidiaries of TOG. For the most part, the cargo was fully containerized, that is, secured in aluminum, steel-reinforced oblong boxes, measuring twenty to forty feet in length. The containers were loaded onto or unloaded from vessels by means of cranes and forklift trucks owned by TOG and operated by its employees. Non-containerized cargo, which did not constitute the major bulk of goods handled by TOG, would be unloaded by TOG's employees from the carrier making delivery to the terminal and repackaged in containers designated as LCL (less-than-container load) before loading onto the vessel.

10. TOG did not have any ownership interest in vessels, railroads or over-the-road trucks.

11. TOG did not refuse access to the Corporation Tax Bureau to conduct a field audit with respect to its operations and no such field audit was ever performed. It was stipulated at the February 16, 1978 hearing that the Corporation Tax Bureau issued estimated notices of deficiency against TOG.



12. The evidence proffered by TOG to demonstrate that the Corporation Tax Bureau issued erroneous and excessive notices of estimated deficiency was, concededly, based on a calculation of "estimated amounts" which were not intended to be the final figures representing the total tax due and owing if TOG was required to file under Article 9-A of the Tax Law.

13. TOG filed its New York State Report for 1970 on or about September 23, 1971. The Corporation Tax Bureau issued a Notice of Estimated Deficiency against TOG for that year on May 15, 1975. TOG did not execute or file a waiver of the Statute of Limitations for that year.

14. By letters dated April 24, 1973 and April 19, 1974, the Corporation Tax Bureau advised TOG of its position that TOG was engaged in terminal activities rather than activities denoting "transportation" company and requested that TOG file reports under Article 9-A of the Tax Law. No such filing was made.

15. While TOG contends that the filings in 1968 and 1969 under Article 9-A were made in error, the credible evidence points to a contrary conclusion, in view of the fact that (i) TOG's legal counsel in 1968 and 1969 was the same as that retained during years here in question; and (ii) on or about December 8, 1972 (pursuant to notices dated August 16, 1971) TOG paid a deficiency in tax for the years 1968 and 1969 under Article 9-A of the Tax Law, which payment was made at a time when TOG's chief tax and financial officer was engaged in filing reports under Article 9 of the Tax Law for the years here in question.

16. On or about July 15, 1977, AEI filed a petition for arrangement under Chapter XI of the Federal Bankruptcy Law and TOG ceased its operations in July, 1975, except for winding up its business affairs.

#### CONCLUSIONS OF LAW

A. That, pursuant to section 209(1) of the Tax Law, the State of New York provides for a franchise tax upon both domestic and foreign corporations.

B. That, pursuant to section 209(4) of the Tax Law, corporations subject to tax under sections 183 et seq. of the Tax Law, are exempt from the aforesaid tax.

C. That, pursuant to sections 183 and 184 of the Tax Law, the State of New York provides for a franchise tax computed on capital stock and gross earnings, respectively, upon both domestic and foreign "transportation and transmission" corporations.

D. That the burden of overcoming the deficiency asserted by the Corporation Tax Bureau herein is upon petitioner, Transocean Gateway Corporation, and any claimed exemption must be clearly and plainly established. Matter of Lieberman, 41 N.Y.2d 774, 777 (1977).

E. That petitioner, Transocean Gateway Corporation, did not sustain its burden of establishing that it was a transportation corporation within the meaning and intent of sections 183 and 184 of the Tax Law and thereby entitled to the exemption provided in section 209(4) of the Tax Law. See, Matter of McAllister Bros. v. Bates, 272 App. Div. 511, 72 N.Y.S.2d 532 (3rd Dept. 1947), leave to appeal denied 297 N.Y. 1037, 73 N.Y.S.2d 485 (1974); New York and Albany Lighterage Co. v. Cantor, 239 N.Y. 64 (1924).

F. That petitioner, Transocean Gateway Corporation, filed reports under Article 9 which sufficiently detailed the nature of its business activity so that the Audit Division should or could have been aware at the time of the filing of the report that the activities conducted were that of an Article 9A corporation and not that of an Article 9 corporation. Evidence of this is the Article 9A reports filed for the years 1968 and 1969, the 1970 Article 9 report which listed the principal business activity as "development and operation of port facilities"; letters from the Audit Division dated April 24, 1973 and

April 19, 1974 informing Transocean Gateway Corporation that it was properly taxable under Article 9A rather than Article 9. See, Matter of Arbesfeld, Goldstein et al., 62 A.D.2d 627 (1978).

G. That, pursuant to section 1083 of the Tax Law, the deficiency asserted against petitioner, Transocean Gateway Corporation, for the year 1970 is barred by the three-year statute of limitations. See Matter of Hewitt v. Bates, 297 N.Y. 239 (1948).

H. That petitioner, Transocean Gateway Corporation, reasonably relied on the advice and counsel of its legal representative that said petitioner was reporting and paying tax in compliance with the applicable provisions of the Tax Law and, therefore, said petitioner's failure to file returns for the years in question, did not constitute willful neglect. Accordingly, penalty pursuant to section 1085(a) of the Tax Law is hereby waived and cancelled.

I. That the Audit Division is hereby directed to recompute the Notices of Estimated Deficiency issued May 15, 1975 to reflect the actual liability of Transocean Gateway Corporation.

J. That the petition of Transocean Gateway Corporation is granted to the extent set forth in Conclusions of Law "G", "H" & "I", supra; and that, except as so granted, the petition is denied and the notices of estimated deficiency issued May 15, 1975 are sustained.

DATED: Albany, New York

MAY 01 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER